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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

PACIFIC PERIODICALS LLC, Plaintiff and Appellant, v. CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD et al., Defendants and Respondents.	B219701 (Los Angeles County Super. Ct. No. BS120149)

APPEAL from a judgment of the Superior Court of Los Angeles County. David P. Yaffe, Judge. Affirmed.

Cooley, Seth A. Rafkin and Summer J. Wynn for Plaintiff and Appellant.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Paul D. Gifford, Assistant Attorney General, W. Dean Freeman, Felix E. Leatherwood and Anthony Sgherzi, Deputy Attorneys General, for Defendants and Respondents.

* * * * * *

Appellant Pacific Periodicals LLC appeals from the judgment of dismissal following the sustaining of the demurrer of respondents the Employment Development Department and its director Patrick W. Henning (collectively EDD) and the California Unemployment Insurance Appeals Board (the Appeals Board) without leave to amend. The trial court found that appellant had failed to exhaust its administrative remedies. We agree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On appeal from a judgment of dismissal following a demurrer sustained without leave to amend, we assume the truth of all well-pleaded facts, as well as those that are judicially noticeable, but not contentions, deductions or conclusions of fact or law. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Appellant is engaged in the business of distributing magazines and newspapers in the western United States, including California. On August 26, 2005, appellant filed a petition with the Appeals Board challenging a tax assessment issued by the EDD. Specifically, appellant challenged the EDD's conclusion, made pursuant to Unemployment Insurance Code section 621, subdivision (b), that individuals who delivered magazines and newspapers for appellant should be characterized as employees rather than independent contractors.

On May 23, 2007, an administrative law judge (ALJ) commenced an evidentiary hearing on the petition. After the EDD presented its evidence, the ALJ adjourned the hearing and scheduled a second day of hearing on July 26, 2007. Between the first and second hearings, the parties discussed settlement and engaged in substantial negotiations. One of the primary settlement terms was that the assessment of personal income tax (PIT) against appellant would be reduced from 6 percent to 3 percent. The precise figure was not determined at that time so that appellant could determine whether some of its magazine and newspaper carriers had already made PIT payments, which would lower the final settlement figure.

On November 14, 2007, Linda Warren at the Pasadena Office of Appeals contacted Judith Hall, senior staff counsel for the EDD, via e-mail requesting a status update. Hall replied the next day by e-mail stating: "We have reached a stipulated agreement and are just getting the agreement signed and then we will call you to set the date to put the stip on the record and withdraw!!"

The EDD performed the final calculation for the settlement figure, and Hall sent the stipulated agreement to appellant's attorney on November 20, 2007 with the following e-mail message: "We decided to reduce the PIT (Personal Income Tax) from 6% to 3% since it was unlikely that you would be able to contact people to abate the PIT. . . . [¶] Total revised liability is $173,399.16 [from original liability of $214,828.63] as of 9/17/07 if we reduce the PIT to 3% from 6%. . . . [¶] . . . [¶] Please have your client sign the agreement and you sign it and then I will have our Department sign it. I will contact the Office of Appeals to arrange a hearing by conference call to get the stip on the record. Then your client can withdraw the petition for reassessment . . . ." The agreement attached to the e-mail is entitled "Stipulated Agreement," and provides in paragraph No. 5 that "EDD agrees to accept the sum of $173,399.16 (includes interest of $29[,]192.51 as of 9/17/07) in full satisfaction of all amounts due for the relevant period . . . ." The attached agreement contains a signature block for both Hall and Vinnie Clark, manager of the EDD's Van Nuys Tax Office.

On November 29, 2007, after the Thanksgiving holiday, Vinnie Clarke sent an e-mail to Hall stating that while she did not object to the reduction of PIT from 6 percent to 3 percent, she wanted the agreement to include additional wording and requirements regarding the interim reporting provisions "for consistency purposes" because the EDD was planning to adopt a new position on interim reporting. Hall responded the next day by e-mail stating, "This is not a settlement—it is a stipulated agreement." Copies of the e-mails were forwarded to appellant's attorney.

On January 25, 2008, Hall responded to a letter from appellant's attorney, who stated he believed an agreement had been reached between his client and the EDD. Apparently attached to the letter from appellant's attorney was a "signed stipulated

agreement." Hall wrote the following: "Unfortunately, your assumption that the Department and your client reached an agreement is incorrect. First, I told you that any agreement was subject to approval by the manager of the office where the audit was conducted. As you know, the Department is my client and the stipulated agreement had to be approved by my client—which is Vinnie Clarke. Secondly, I told you the stipulated agreement is different from a settlement which is subject to the conditions of UIC § 1236, which would require approval by the Attorney General. Therefore, your conclusion that further approval is not required for a stipulated agreement is in error. [¶] On November 30, 2007, I forwarded Ms. Clarke's e-mail to you stating she would not approve the agreement as drafted. More specifically, she stated the agreement must provide that your client agree to prospective reporting of its workers from the date of the agreement, and that there will be no forgiveness of the interim period. The signed agreement returned to me does not include these provisions. If you do not agree to include the provisions as required by Ms. Clarke, the Department is prepared to go forward with the hearing."

On January 29, 2008, Warren e-mailed Hall again, asking for another status update because "the petitioner is inquiring as to the status of this matter." Hall replied to the e-mail the same day stating, "It appears that the parties have failed to reach a stipulated agreement. Please proceed with the hearing." She copied appellant's attorney on the e-mail.

Appellant then brought a motion before the ALJ seeking enforcement of the stipulated agreement. Both parties submitted written and oral arguments and evidence. On April 28, 2008, the ALJ issued a written decision granting appellant's motion. The decision stated: "The evidence in this matter make [*sic*] clear the fact that an agreement between the parties had been reached, that each party acted in [a] manner consistent with the belief that an agreement had been reached, including the fact that each party advised the Office of Appeals that an agreement had been reached, but that the Department decided to back out of an agreement which had already been stipulated to by both sides."

On May 6, 2008, the EDD appealed the ALJ's decision to the Appeals Board. Both parties submitted written arguments. On October 17, 2008, the Appeals Board issued a written opinion reversing the ALJ's decision. The Appeals Board concluded that the parties' settlement was invalid because it had to be approved by the Attorney General since it reduced appellant's liability by more than $7,500, and that it also had to be approved by the EDD director in the absence of a written delegation that the EDD attorney has authority to bind the EDD. The Appeals Board "returned" the matter "to the office of appeals to be set for a continued hearing and decision on the merits."

On April 17, 2009, appellant filed this action in the Superior Court of Los Angeles County. The matter was assigned to the writs and receivers department (Hon. David P. Yaffe). The first cause of action in the complaint is a petition for writ of mandate ordering the Appeals Board to set aside its decision reversing the ALJ's decision and to affirm the ALJ's decision granting the motion to enforce the agreement. The other causes of action are for specific performance, promissory estoppel and declaratory relief, seeking a declaration that the agreement is valid and enforceable.

Respondents demurred, arguing that the trial court lacked subject matter jurisdiction because appellant had failed to exhaust its administrative remedies. Following a hearing on the demurrer, the trial court sustained the demurrer without leave to amend, finding that it lacked jurisdiction to hear any of appellant's claims due to appellant's failure to exhaust administrative remedies, and stated that it would not entertain piecemeal administrative exhaustion. This appeal followed.

DISCUSSION

I. Standard of Review

We review de novo a trial court's sustaining of a demurrer without leave to amend, exercising our independent judgment as to whether a cause of action has been stated as a matter of law. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) We assume the truth of properly pleaded allegations in the complaint and give the complaint

a reasonable interpretation, reading it as a whole and with all its parts in their context. (S*top Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 558; *People ex rel. Lungren, supra*, at p. 300.) We may disregard allegations which are contrary to law or to judicially noticed facts. (*Wolfe v. State Farm Fire & Casualty Ins. Co.* (1996) 46 Cal.App.4th 554, 559–560.) "On appeal, we do not review the validity of the trial court's reasoning but only the propriety of the ruling itself." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517.) We apply the abuse of discretion standard in reviewing a trial court's denial of leave to amend. (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318; *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497–1498.) The plaintiff bears the burden of proving there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan, supra*, at p. 318; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

II. The Parties' Contentions.

Appellant contends that the trial court erred in sustaining the demurrer without leave to amend based on the exhaustion of remedies doctrine. Appellant argues that the remedy it seeks by its complaint (i.e., enforcement of a settlement agreement between it and the EDD) is not one for which there is any statutory administrative remedy. Appellant also argues that even if it were, there are exceptions to the doctrine that are applicable here. Finally, appellant argues that the complaint pleads facts showing an enforceable agreement between appellant and the EDD.

Respondents contend that once it became clear to appellant that settlement would not occur, it was necessary for appellant to continue with the administrative hearings in order to finalize its EDD tax liability. Respondents argue that regardless of how appellant characterizes this action, the underlying issue is appellant's tax liability, and that the law is clear that a taxpayer seeking to fix a tax must exhaust its administrative remedies, pay the disputed assessment, and then file a suit for refund. Respondents also argue that a ruling granting appellant's writ would enable appellant to circumvent the requirement of exhaustion of administrative remedies established by the Legislature for

resolving disputes as to tax assessments, and this would afford appellant a remedy unavailable to other California taxpayers.

III. The Demurrer Was Properly Sustained Without Leave to Amend.

A. Exhaustion of Administrative Remedies

"The well established doctrine of exhaustion of administrative remedies dictates that before a party may seek judicial review of the decision of an administrative board or officer, he must exhaust all available administrative remedies." (*Bleeck v. State Board of Optometry* (1971) 18 Cal.App.3d 415, 431 (*Bleeck*).) "In California the requirement is jurisdictional." (*Ibid*.) """The doctrine, whenever applicable, requires not merely the initiation of prescribed administrative procedures; it requires pursuing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention."""" (*Id*. at p. 432 [quoting *Woodward v. Broadway Fed. S. & L. Assn.* (1952) 111 Cal.App.2d 218, 221]; *Fiscus v. Dept. Alcoholic Bev. Control* (1957) 155 Cal.App.2d 234, 236.) "Before seeking judicial review a party must show that he has made a full presentation to the administrative agency upon *all issues* of the case and at *all prescribed stages* of the administrative proceedings." (*Bleeck*, *supra*, at p. 432 [italics added].) "The doctrine of exhaustion of administrative remedies may not be circumvented by bringing actions other than administrative mandamus such as actions for declaratory relief [citation], or actions seeking injunctive relief [citation]." (*Ibid*.) The doctrine of exhaustion has frequently been applied to tax proceedings. (*Mercury Casualty Co. v. State Bd. of Equalization* (1986) 179 Cal.App.3d 34, 41; *American Employers Group, Inc. v. Employment Development Dept.* (2007) 154 Cal.App.4th 836, 843 (*AEG*).)

"'The requirement of exhaustion of administrative remedies is founded on the theory that the administrative tribunal is created by law to adjudicate the issue sought to be presented to the court, and the issue is within its special jurisdiction. If a court allows a suit to go forward prior to a final administrative determination, it will be interfering with the subject matter of another tribunal.'" (*AEG*, *supra*, 154 Cal.App.4th at p. 843.)

Our Supreme Court has held: "The Unemployment Insurance Act expressly provides for the creation, from the deposits of individual contributions, of a specific fund which is to be the source of benefits thereafter paid. [Citations.] If proceedings which halt the collection of the tax were allowed to be brought before the payments are made, the power would be placed in the hands of employers to so delay the creation of the fund as to frustrate the purposes of the act. It has been expressly declared by this court that these purposes are of great public importance, and that procedural obstacles which would delay or prevent their fulfillment are to be avoided." (*Modern Barber Col. V. Cal. Emp. Stab. Com*. (1948) 31 Cal.2d 720, 732 (*Modern Barber*).)

Additionally, article XIII, section 32 of the California Constitution provides that a taxpayer must pay all contested taxes before seeking judicial review of a tax controversy, at whatever stage, if the net result would be to enjoin or prevent any step in the tax assessment and collection process (the so-called "pay first, litigate later" rule): "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature." Similarly, section 1851 of the Unemployment Insurance Code provides: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin the collection of any contribution sought to be collected under this division."

B. Appellant's Arguments

Appellant first argues that it is not required to further exhaust administrative remedies because it is not seeking relief for which there is an administrative remedy provided by statute. Appellant points out that its complaint filed in the trial court does not challenge the merits of the EDD's original determination regarding the classification of appellant's work force, and does not challenge the amount of employee taxes allegedly owed. Rather, according to appellant, the complaint seeks only to enforce an alleged

agreement between the parties, which is "completely outside of EDD's administrative jurisdiction." But appellant's argument is belied by the fact that appellant originally sought enforcement of the alleged agreement before the ALJ, under which appellant gained a significant reduction in tax liability.

Appellant argues that to the extent it is required to exhaust administrative remedies, it has already done so. Following the ALJ's decision to grant the motion to enforce the agreement, the EDD appealed the decision to the Appeals Board, which reversed the ALJ's ruling. Appellant asserts that the decision of the Appeals Board is final. (Unemp. Ins. Code, § 410.) But appellant ignores the fact that the Appeals Board specifically found the settlement invalid and remanded the matter "to the office of appeals to be set for a continued hearing and decision on the merits." As such, appellant was required to return to the office of appeals and proceed with its original challenge to the tax assessment.

Appellant argues that any challenge to the tax assessment on remand can only address the original issues of "whether the carriers at issue are properly classified as independent contractors and whether appellant owes any unemployment insurance taxes to EDD," whereas the controversy here is whether appellant is entitled to enforce a settlement agreement against the EDD. While this may be so, appellant cannot escape the requirement that it is required to pursue its administrative remedies """to their appropriate conclusion and await[] their final outcome before seeking judicial intervention.""" (*Bleeck*, *supra*, 18 Cal.App.3d at p. 432.)

Appellant also argues that it should be exempt from the administrative exhaustion remedy because requiring it to go back to the ALJ for an adjudication on the merits would be futile. Appellant asserts that the EDD's position on the issue is clear and the Appeals Board has already decided the issue in the EDD's favor. But the record shows that neither the EDD nor the Appeals Board ever dealt with the assessment *amount* proposed by the EDD. Rather, the EDD wanted additional language regarding interim reporting to be added to any settlement agreement, and the Appeals Board found the

settlement to be unenforceable because it had not been approved by the EDD's director and the Attorney General.[1]

Appellant also argues that it was not required to "pay first, litigate later," because article XIII, section 32 of the California Constitution is not applicable here. Appellant relies on the case of *Modern Barber, supra,* 31 Cal.2d 720, in which our Supreme Court found that an earlier version of section 32 had no application to unemployment insurance payments because such contributions are not mentioned in article XIII, they are required to be held in a specific fund separate and apart from the general revenues of the state, and they therefore constitute "special taxes." (*Modern Barber, supra,* at pp. 723–724.) Nevertheless, the Court held that an employer seeking to challenge an unemployment insurance tax assessment under the predecessor to section 1851 of the Unemployment Insurance Code cannot obtain judicial review of its tax liability before paying the disputed amount. (*Modern Barber, supra,* at p. 733.)

Appellant argues that section 1851 of the Unemployment Insurance Code is also inapplicable because appellant is not seeking "'to prevent or enjoin'" the collection of any tax; rather, appellant is willing to pay the allegedly agreed-upon amount. The *Modern Barber* court rejected the same argument, concluding that any determination by the trial court that the administrative body had erred in finding the existence of an employer-employee relationship would have the effect of precluding the agency from

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[1] Appellant suggests that the EDD makes a distinction between "settlement agreements" and "stipulated agreements," and that it only requires Attorney General approval for "settlement agreements." But in making its determination that the parties' agreement was invalid because it was not approved by the Attorney General, the Appeals Board noted: "California Unemployment Insurance Code section 1236 establishes the procedure to be followed for settlement of civil employment tax matters. That section provides that any settlement involving in [*sic*] a tax reduction [in] excess of $7,500 requires the settlement be approved by the director and the assigned administrative law judge. . . . Before the proposed settlement can be submitted to the administrative law judge, however, it must be submitted to and approved by the Attorney General." The Appeals Board appears to be correct in finding that the alleged settlement required approval by the Attorney General; there is no distinction in the statute between settlement agreements and stipulated agreements.

collecting the tax. (*Modern Barber, supra*, 31 Cal.2d at p. 723.) Moreover, "[i]t has been recognized that declaratory relief [as appellant seeks here] 'may in every practical sense operate to suspend collection of the state taxes until the litigation is ended' in the very same manner that an injunction would. [Citation.]" (*Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129, 1137–1138.)

Finally, appellant relies on the *AEG* case to support its position that the trial court erred. There, AEG and the EDD reached a settlement that AEG characterized as "tentative." (*AEG, supra*, 154 Cal.App.4th at p. 840.) After the EDD rejected AEG's assertion that a negotiated settlement had been reached, AEG filed a petition for reassessment as well as a superior court action alleging breach of contract along with other claims. (*Id*. at p. 841.) The trial court sustained the demurrer to the breach of contract cause of action without leave to amend. On appeal, the *AEG* court reached the merits of whether the complaint stated a cause of action for breach of contract, concluding that it did not. Appellant argues that because the *AEG* court reached the merits of AEG's contract action and made no mention of exhaustion of remedies in its analysis, the trial court here erred by sustaining the demurrer on exhaustion grounds. But there is no suggestion in the *AEG* opinion that the Appeals Board ordered the matter to be remanded for further proceedings "on the merits," as it did here. This administrative directive cannot be ignored.

Because we find that appellant was required to conclude the administrative hearings, pay the tax assessed by the EDD, and then file a suit for refund, we find no error in the trial court's sustaining of the demurrer without leave to amend.

DISPOSITION

The judgment is affirmed. Respondents are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ